Supreme Court, U.S.
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No. 02-983

In the

Supreme Court of the United States

FRANK CASS,

Petitioner,

v.

PATRICIA LOVE STEPHENS, INDIVIDUALLY AND AS TRUSTEE OF THE WALTER H. STEPHENS TRUST, THE SSH TRUST, THE SUTTON ELIZABETH STEPHENS IRREVOCABLE TRUST, and THE HEATHER LOVE STEPHENS IRREVOCABLE TRUST,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CONSTITUTIONAL AND STATUTORY PROVISIONS

Texas Rules of Appellate Procedure (Effective January 1, 2003):

47.4 Memorandum Opinions. If the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it. An opinion may not be designated a memorandum opinion if the author of a concurrence or dissent opposes that designation. An opinion must be designated a memorandum opinion unless it does any of the following:

> **(a)** establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases;
>
> **(b)** involves issues of constitutional law or other legal issues important to the jurisprudence of Texas;
>
> **(c)** criticizes existing law; or
>
> **(d)** resolves an apparent conflict of authority.

47.7 Citation of Unpublished Opinions. Opinions not designated for publication by the court of appeals under these or prior rules have no precedential value but may be cited with the notation, "(not designated for publication)."

Texas Rules of Appellate Procedure (Amended effective January 1, 2003):

47.3 Publication of Opinions.

(a) **The initial decision.** A majority of the justices who participate in considering a case must determine - before the opinion is handed down - whether the opinion meets the criteria stated in 47.4 for publication. If those criteria are not met, the opinion will be distributed only to the persons specified in Rule 48, but a copy may be furnished to any person on request by that person.

(b) **Notation on Opinions.** A notation stating "publish" or "do not publish" must be made on each opinion.

(c) **Reconsideration of decision on whether to publish.** Any party may move the appellate court to reconsider its decision regarding publication of an opinion but the court of appeals must not order any unpublished opinion to be published after the Supreme Court or Court of Criminal Appeals has acted on any party's petition for review, petition for discretionary review, or other request for relief.

(d) **High-court order.** The Supreme Court or the Court of Criminal Appeals may, at

any time, order a court of appeals' opinion published.

47.4 Standards for Publication. An opinion should be published only if it does any of the following:

(a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases;

(b) involves a legal issue of continuing public interest;

(c) criticizes existing law; or

(d) resolves an apparent conflict of authority.

47.7 Unpublished Opinions. Opinions not designated for publication by the court of appeals have no precedential value and must not be cited as authority by counsel or by a court.

STATEMENT OF THE CASE

This case is a textbook example of an abuse of the system. Filed on November 6, 1986, its long procedural history includes multiple mandamus actions,[1] interlocutory appeals,[2] weeks of discovery hearings,[3] a six-week sanction hearing which culminated in an award of sanctions,[4] a two-week hearing on a

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[1]*Frank W. Cass & Cass Oil Co. v. Hon. Brock Jones, Judge, 112th Judicial District Court*, Cause No. 08-9000222-CV in the Court of Appeals for the Eighth District of Texas at El Paso (sanctions); *William G. Cass & Michael L. Cass v. Hon. Brock Jones, Judge, 112th Judicial District Court*, Cause No. 08-90-00223-CV in the Court of Appeals for the Eighth District of Texas at El Paso (sanctions); *Frank W. Cass & Cass Oil Co. v. Hon. Brock Jones, Judge, 112th Judicial District Court*, Cause No. D-0105 in the Supreme Court of Texas (sanctions); *William G. Cass & Michael L. Cass v. Hon. Brock Jones, Judge, 112th Judicial District Court*, Cause No. D-0106 in the Supreme Court of Texas (sanctions); *Frank W. Cass & Cass Oil Co. v. Hon. Brock Jones, Judge, 112th Judicial District Court*, Cause No. 08-90-00305-CV in the Court of Appeals for the Eighth District of Texas at El Paso (severance); *William G. Cass & Michael L. Cass v. Hon. Brock Jones, Judge, 112th Judicial District Court*, Cause No. 08-90-00296-CV in the Court of Appeals for the Eighth District of Texas at El Paso (severance); *Frank W. Cass & Cass Oil Co. v. Hon. Brock Jones, Judge, 112th Judicial District Court*, Cause No. 08-90-00289-CV in the Court of Appeals for the Eighth District of Texas at El Paso (sanctions); *William G. Cass & Michael L. Cass v. Hon. Brock Jones, Judge, 112th Judicial District Court*, Cause No. 08-90-00290-CV in the Court of Appeals for the Eighth District of Texas at El Paso (sanctions); *Frank W. Cass & Cass Oil Co. v. Hon. Brock Jones, Judge, 112th Judicial District Court*, Cause No. D-2107 in the Supreme Court of Texas (sanctions); *William G. Cass & Michael L. Cass v. Hon. Brock Jones, Judge, 112th Judicial District Court*, Cause No. D-2108 in the Supreme Court of Texas (sanctions).

[2]Notice of Appeal (from Interlocutory Order Granting Temporary Injunction), 1987 TR 92-93.

[3]XVI:181.

[4]Order Imposing Sanctions, 1990 TR 749-54; CR:I:193-98; Memorandum Opinion, CR:I:190-92.

motion to exclude or suppress evidence,[5] numerous pretrial motions including a motion to disqualify plaintiffs' counsel,[6] a motion to disqualify plaintiffs' expert,[7] and eight motions for summary judgment.[8] Petitioner Frank W. Cass (Cass) changed attorneys and law firms three times.[9] Michael L. Cass[10] changed

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[5]XVI:183.

[6]Defendant's Motion to Disqualify Attorneys of Record, 1990 TR 439-44.

[7]Defendant's Motion to Disqualify Plaintiffs' Expert Witness or Alternatively, To Disqualify Plaintiffs' Witness as a Sanction, CR:II:482-95.

[8]The Individual Defendants' Motion for Partial Summary Judgment and Supporting Brief, CR:II:372-461; Defendants' Motion for Summary Judgment as to Limitations, CR:II:462-78; Defendants' Supplemental Brief on Alter Ego Claim, CR:III:556-97; Defendants' Motion for Summary Judgment as to Issue of Unauthorized Expenditures, CR:III:716-28; Defendant's Motion for Summary Judgment on the Issues of Field Supervision Fees, Revenue Distribution Fees, and Ad Valorem Tax Services, CR:V:1604-16; Defendants' Motion for Summary Judgment on the Issue of Fixed Rate Overhead, CR:V:1620; Defendants' Motion for Summary Judgment on the Issue of Affiliate Vendor Overcharges, CR:V:1650-71; Defendants' Supplemental Motion for Summary Judgment as to Application of the Discovery Rule and the Doctrine of Fraudulent Concealment; CR:V:1672-1739; Defendants' Motion for Summary Judgment as to Exemplary Damages and Allegations of Tortious Injury, CR:V:1740-48; Defendants' Motion For Summary Judgment as to Limitations on Specific Charges, CR:V:1749-65.

[9]Designation of Additional Attorneys of Record, 1990 TR 306-308; Motion to Withdraw, CR:VI:2021-25; Order of Withdrawal, CR:VI:2026-27; Motion to Appear as Attorney of Record for Purpose of Continuance Only, CR:VI:203638; Notice of Entry of Appearance, CR:VI:2064-65.

[10]Michael is Cass's son. He was a defendant at trial and appealed, along with Cass, to the El Paso Court of Appeals and filed a petition for review, which the Texas Supreme Court denied. He has not petitioned for writ of certiorari in this Court.

attorneys four times.[11] Cass filed four Motions for Continuance.[12] Appellants sued Mrs. Stephens three times, her experts, her attorneys, and her investigators in other forums.[13]

Finally, the month-long jury trial began on May 28, 1997—almost eleven years after the case was filed. The jury found in favor of Mrs. Stephens on most of her affirmative claims and against Cass and his son, Mike Cass.[14] The Honorable Brock Jones entered his judgment on September 11, 1997.[15] Mrs. Stephens filed a written remittitur pursuant to Texas Rule of Civil Procedure Rule 315.[16] The Motions for JNOV, New Trial or in the alternative, Motion to Modify were overruled.[17]

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[11]Designation of Additional Attorneys of Record, 1990 TR 306-308; Motion to Withdraw, CR:VI:2021-25; Order of Withdrawal, CR:VI:2026-27; Motion to Appear as Attorney of Record for Purpose of Continuance Only, CR:VI:2036-38; Notice of Entry of Appearance, CR: VI:2064-651; Defendant Michael L. Cass' Notice of Appeal, CR: VI:2269-70.

[12]Motion for Continuance, CR:II:364-71; Defendants' Second Motion for Continuance, CR:VI:2015-18; Defendants' Motion for Continuance, CR:VI:2029-35; Defendants' Motion for Continuance, CR:VI:2040-41; Defendants' Motion for Continuance, CR:VI:2051-57.

[13]XV:104, 153-154; XXVII:23-25, 77-78.

[14]Charge of the Court, CR:VI:2090-2129; Charge of the Court (Second Phase), CR:VI:2130-37.

[15]Final Judgment, CR:VI:2182-92.

[16]Written Remittitur, CR:VI:2264-66.

[17]Order Overruling Defendants' Motions for New Trial, CR:VI:2262-63. (This order specifically addresses the remittitur.)

As remitted, the judgment against Cass is for actual damages of $786,243.91, prejudgment interest of $919,154.47, attorneys' fees of $1,575,000.00 (contingent in part on appeals), court costs of $18,155.55, and punitive damages of $2.5 million (fraud) and $2.5 million (conversion).

Judge Jones also awarded $978,492.10 in sanctions against Cass for abuse of discovery.[18] Cass appealed, and the El Paso Court of Appeals affirmed the trial court in all respects.[19] Cass filed a motion for rehearing which was denied.- Cass then filed a petition for review in the Texas Supreme Court, which was denied. Cass then filed a motion for rehearing in the Texas Supreme Court, which was also denied. Finally, sixteen years after this case was initially filed, Cass has petitioned this Court for writ of certiorari.

STATEMENT OF FACTS[20]

Respondent Patricia Love Stephens ("Mrs. Stephens") is the widow of General Walter H. Stephens ("General Stephens"), a retired Brigadier General in the U.S. Marine Corps. Their two daughters, Heather and Sutton, are beneficiaries of the Respondent Trusts.

In the late 1960s, Mr. Cass and General Stephens formed a partnership to invest in oil and gas properties and successfully

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[18]Final Judgment, CR:VI:21, 82.

[19]*Cass v. Stephens*, 2001 WL 28092 (Tex.App. - El Paso 2001, pet. denied).

[20]Because the jury found the facts in Mrs. Stephens' favor and the Court of Appeals affirmed those findings, it is appropriate for this Court to accept Mrs. Stephens' version of disputed facts. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 447 (1993).

drilled numerous wells. XVIII:75; XVI:98-99. General Stephens and Mr. Cass were not only equal partners, but close friends. XXI:26. Their families attended dinner parties together, exchanged Christmas gifts, and "were just friends." XV:88.

In the mid-1970s, General Stephens' health declined considerably. He had multiple surgeries for a broken hip and a broken back that left him almost unable to walk. XV:74-78. He developed Pickwickian Syndrome, a medical condition that caused him to sleep up to twenty hours a day. XV:79-81. These illnesses and injuries left the General unable to meaningfully participate in his business. XV:74-84.

Due in part to Cass's desire to bring his son Michael L. Cass into the business, General Stephens and Cass terminated their partnership by a written "Agreement to Terminate" effective January 1, 1978. See XXII:13; PX 935. Contemporaneously, by formal written ballot election, Cass became the successor operator of all former Stephens & Cass properties, including the sixty-eight oil and gas wells involved in this suit (the "Stephens Wells"). XXI:143; VIII:48; PX 22. General Stephens retained his ownership interest in the wells and became a nonoperating working interest owner. XVI:108.

On November 14, 1983, Cass purchased certain undeveloped leasehold acreage from General Stephens. PX:122-130; XIII:142, 146, 150-153; XVI:24, 119; XX:31, 41. These undrilled "locations" were on the same leases as the Stephens Wells and were direct offsets to them. XVI:24. Cass then drilled his own wells on the offset locations ("Cass Companion Wells.") XIII:133.

Cass and his son immediately undertook a course of reprehensible conduct. Cass and his son took advantage of

General Stephens' vulnerability and poor health and of Mrs. Stephens' unfamiliarity with the business and her personal trust in Cass. The concept was simple. Costs attributable to drilling the Cass Companion Wells were charged to the Stephens wells, expenses attributable to the Cass Companion Wells were charged to the Stephens wells, revenue from the Stephens wells was shifted to the Cass Companion Wells, and equipment and materials from the Stephens wells were converted for use on the Cass Companion Wells without payment to Mrs. Stephens. VII:94; VI:160; XXIII:52-55; V1:160. The Cass Companion Wells were then sold for $12 million. XXIII:97.

None of this was an accident. Bert Nelson, who had officed with Cass, testified to the meticulous nature with which Cass kept his books and records, and that Cass knew all of the details of operations including costs and expenses incurred. XIII:8-13. Cass was a meticulous recordkeeper who had bragged of losing only one file in his business career. XIII:10. He reviewed the invoices and joint interest billings before they were sent out. XVII:39.

During this time neither General Stephens nor his wife had any reason to suspect what was occurring. General Stephens died on March 23, 1984, Mrs. Stephens' birthday. She faced a difficult task getting the estate's affairs in order. XV:70, 83-84. General Stephens had not filed an income tax return or paid property taxes for three years. XV:86. Years of invoices and uncashed checks had accumulated in his home. XV:83-84. He had, however, paid his friend Cass for joint interest bills on the Stephens wells. XV:87-88.

Prior to her husband's death, Mrs. Stephens had not been involved in the oil and gas business and had been a housewife and mother. XV:70. She had very little knowledge of the oil and

gas business. XV:86. Mrs. Stephens and her advisors requested information on the jointly-owned wells for the purpose of completing the estate tax return. XV:97-98. Cass withheld requested information. XV:100.

In March 1986, Cass sent Mrs. Stephens a letter proposing to shut in twenty-six wells. XV:98-99. She happened to see Bob Franklin, an engineer who had appraised the wells for estate tax purposes. *Id.* Based on his advice, Mrs. Stephens wrote a letter to Cass asking him to show her on a lease-by-lease basis how the leases would be held without production. *Id.* In response, Cass called Mrs. Stephens and "went off the deep end." *Id.* Over the course of the three-hour telephone conversation, he became first evasive and then insulting. XV: 100-101. Cass told Mrs. Stephens that she did not know what she was doing and neither did anyone working for her, including Mr. Franklin; that her CPA, Deana Cole, was a "dingaling"; and that her estate attorney, Robb Stewart, didn't know anything. XV:100.

Concerned that Cass was withholding information, Mrs. Stephens and her estate attorney hired a private investigator who recommended a "trash cover." XV:101, XV:10-13. The trash cover revealed that between 150,000 and 200,000 documents were systematically discarded over a period of twenty-five months, including documents which were the subject of pending discovery requests. Entire original files were thrown out, including the pump installation and development files. These files were essential to any effort to trace the movement of equipment. XV:54-56, XXIII:92, XV:56-57. Cass even discarded the only signed copy of the original Operating Agreement after the lawsuit was filed. VI:45-47. (The Operating Agreement is the document that establishes the core rights and obligations of the parties. VI:4.8.)

Mrs. Stephens also hired Gruy Petroleum Management Company ("Gruy") to conduct an audit of revenue and expenses for the jointly-owned wells. XV:101. Gruy produced two reports - a Revenue Audit Report (PX 18) and an Expenditure Audit Report (PX 19). Both reports indicated major discrepancies — the Expense Report showed a $2,900,000.00 discrepancy, and the Revenue Report showed a $9,000,000.00 shortage. *Id.*

After receiving the audit reports from Gruy in September 1986, Mrs. Stephens sent copies to the other working interest owners with a financial stake in the wells. XV:103-104. In response, Cass sued her for defamation.

At trial, Mrs. Stephens presented evidence of Cass's wrongful conduct primarily through her expert accountant, Harold Eldridge, who had worked continuously for eight months to complete his report. VIII: 113. The report meticulously detailed Cass's wrongful conduct. PX:1201A-1201E. Mr. Eldridge identified twenty-three categories of wrongful conduct; Volume 1 contains a section explaining each category. In addition, Mr. Eldridge prepared a section on each of the sixty-eight Stephens Wells with a summary for that particular well, a commentary describing the conduct, and backup documentation for his conclusions by well, as well as by month. His summary report consists of an opinion letter and five notebooks, identified as Exhibits PX 1201A-1201E respectively.

The jury found that Cass breached the Operating Agreements, found reasonable attorneys' fees for the breach of contract claims, found that Cass had committed fraud, found that Cass and Mike Cass had committed conversion, found that Cass had fraudulently concealed his breach of contract, found actual damages, and found punitive damages for fraud and conversion. The jury also answered discovery rule issues in Mrs. Stephens'

favor. The jury rejected Cass's defamation claim. The trial court also imposed discovery sanctions for egregious discovery abuse.

SUMMARY OF THE ARGUMENT

I. This Court has given adequate guidance to lower courts regarding the constitutionality of punitive damages awards. Because the Court of Appeals correctly stated and applied *Gore*, the petition should be denied.

The Texas Court of Appeals analyzed the punitive damages award in strict accordance with this Court's opinion in *BMW v. Gore*. Given the reprehensibility of Cass's conduct and the potential harm to Mrs. Stephens had the scheme continued undetected, the punitive damages award is not excessive. There is ample evidence to support the egregious nature of Cass's conduct, and Cass's assertion that the punitive damages award was based on misconduct not related to the subject matter of the litigation is pure speculation. Furthermore, the punitive damages award is less than one-half of the funds obtained from the sale of the Cass Companion Wells, which further supports its reasonableness.

II. This Court has no jurisdiction over Cass's argument that Texas Rule of Appellate Procedure 47.7 violates due process; thus, Cass's petition should be denied.

This Court has no jurisdiction over Cass's claim that the Texas Court of Appeals' decision not to publish its opinion violates his Constitutional rights. First, Cass failed to move for publication of the opinion as permitted under the Texas Rules of Appellate Procedure, so the issue is not properly before this Court. Second, Rule 47.7 was amended effective January 1,

2003; thus, to the extent Cass complains that unpublished opinions may not be cited, his claim is moot. Finally, because Cass cannot demonstrate that *he* was harmed by the fact that the Court of Appeals' opinion was unpublished, he does not have standing to raise the issue before this Court.

ARGUMENT

I. Under *BMW v. Gore*, the Texas Court of Appeals affirmed a punitive damages award that was not grossly excessive.

Cass asserts a violation of substantive due process. His claim is that the punitive damages awarded against him were "grossly excessive" under *BMW v. Gore*.

This Court has recognized that, in our judicial system, compensatory and punitive damages serve different purposes. *State Farm Mut. Ins. Co. v. Campbell*, No. 01-1289, slip op. at 5 (U.S. April 7, 2003). Compensatory damages are intended to make the plaintiff whole, while punitive damages "serve a broader function; they are aimed at deterrence and retribution." *Id.*

Because the need for deterrence and retribution will depend on numerous and sometimes intangible factors, a jury imposing a punitive damages award makes a qualitative assessment based on facts and circumstances unique to the case before it. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993). Because no two cases are even nearly identical, meaningful comparisons of punitive damages awards are difficult to make. *Id.* But because punitive damages awards are the result of the collective deliberation of jurors who swore to be impartial, were reviewed and upheld by the trial judge who

also heard the evidence, and were affirmed by at least one higher court, they are entitled to a "strong presumption of validity." *Id.* at 456-57.

A. This Court has given more than adequate guidance to state and lower federal courts with respect to excessive punitive damages awards.

Cass argues that this Court should grant his petition for writ of certiorari to "determine whether additional guidelines are needed to prevent state courts from approving awards that violate the due process clause." Cass's Pet. at p. i. But, in an effort to ensure to defendants the due process guarantees of the Fourteenth Amendment, this Court, on several occasions, has offered guidance for trial and appellate courts reviewing punitive damage awards. *See, e.g., Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993); *BMW v. Gore*, 517 U.S. 559, 575 (1996); *State Farm Mut. Ins. Co. v. Campbell*, No. 01-1289 (U.S. April 7, 2003). An evaluation of punitive damages awards does not lend itself to a formulaic or mathematical analysis—this Court has consistently recognized that each case is different, and that there are no absolutes. In fact, although *Gore* set forth specific guidelines for courts to consider, even *Gore* relied on the "eyebrow" test, recognizing that an evaluation of the reasonableness of a punitive damages award is much more art than science. *Gore*, 517 U.S. at 583 (referring to Justice O'Connor's dissent in *TXO* and noting that the ratio in *Gore* must surely "raise a suspicious judicial eyebrow.").

In *BMW v. Gore*, this Court set out factors that a court should consider when reviewing a punitive damages award. *Id.* This Court again addressed the application of these factors in

State Farm Mut. Ins. Co. v. Campbell, No. 01-1289 (U.S. April 7, 2003). The factors, with relevant comments as to their application, are as follows:

The degree of reprehensibility of the Defendant's misconduct: "The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Campbell*, No. 01-1289, slip op. at 8 (citing *Gore*). This Court has instructed courts to evaluate the degree of reprehensibility of a defendant's conduct by considering whether the harm caused was physical or economic, whether the tortious conduct evidenced an indifference to or reckless disregard for the health and safety of others, whether the target of the conduct was vulnerable, whether the conduct involved repeated actions (versus an isolated incident), and whether the harm was the result of intentional malice, trickery, or deceit, or merely an accident. *Id.* The nature of the defendant's conduct is crucial; "trickery and deceit" are *per se* more reprehensible than negligence. *Gore*, 517 U.S. at 576.

This Court has held that a jury may not award punitive damages for conduct occurring in other states, especially when that conduct may be lawful in those states. *Gore*, 517 U.S. at 572; *Campbell*, No. 01-1289, slip op. at 9, 10. Furthermore, this Court recently cautioned states not to allow punitive damages to be based on conduct bearing no relation to the plaintiff's harm. *Campbell*, No. 01-1289, slip op. at 12. Dissimilar acts by the defendant, if they are independent of the acts upon which liability was based, may not be the basis for a punitive damages award. *Id.* And when evaluating a defendants' "recidivist" conduct, courts must ensure that the conduct in question replicates prior wrongful conduct. *Id.* at 12, 13 ("The reprehensibility guidepost does not permit courts to expand the

scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period."). In sum, punitive damages must be related to the harm caused only to the plaintiff and only by the defendant. *Id.* ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis.").

The disparity between actual and punitive damages: In *Gore* and again in *Campbell*, this Court rejected a mathematical or "bright-line" approach to determining what ratio of punitive to actual damages was grossly excessive, *Gore*, 517 U.S. at 582-83; *Campbell*, No. 01-1289, slip op. at 14, although it stated that in practice, an appropriate punitive damages award will rarely be more than a single-digit multiple of a compensatory damages award. *Campbell*, No. 01-1289, slip op. at 14. In reiterating its reluctance to speak in terms of a "bright-line" constitutional limit, this Court noted that low compensatory awards might very well support a higher ratio if, for example, particularly egregious conduct resulted in only minimal economic damages, or when the injury is hard to detect or the monetary value of non-economic harm might have been difficult to establish. *Gore*, 517 U.S. at 582. It is also appropriate to consider the potential harm to plaintiff if the defendants' wrongful conduct would have continued or had a thwarted scheme succeeded. *TXO*, 509 U.S. 460; *Gore*, 517 U.S. 581.

A review of *Haslip*, *TXO*, *Gore*, and *Campbell* reveals that more egregious conduct supports a higher ratio. *See also Campbell*, No. 01-1289, slip op. at 15. In other words, the disparity between actual damages and punitive damages is not necessarily controlling where the defendant's conduct is

particularly egregious. *TXO*, 509 U.S. at 462. *TXO* held that a punitive damages award 526 times actual damages was not "grossly excessive" given the nature of the defendant's conduct. Justice Kennedy, writing for the plurality, concluded:

> In sum, we do not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character. On this record, the jury may reasonably have determined that petitioner set out on a malicious and fraudulent course to win back, either in whole or in part, the lucrative stream of royalties that it had ceded to Alliance. The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow.

Id. This is particularly telling given that this Court suggested just two years earlier in *Haslip* that a ratio of four to one might be near the Constitutional line. *Haslip*, 499 U.S. at 23.

In *TXO*, this Court considered the potential gain to the defendant had its elaborate scheme succeeded, *TXO*, 509 U.S. at 461, although the gain was not quantifiable on the record in that case. This Court has also cited with approval the Alabama courts' punitive damages statute, which prescribes factors for appellate review of punitive damages awards; one of those factors is "the profitability to the defendant of the wrongful

conduct and the desirability of removing that profit and of having the defendant also sustain a loss." *Haslip*, 499 U.S. 1, 21-22.

It seems a logical extension of *TXO* and this Court's punitive damages jurisprudence that, where the benefit to defendant is quantifiable, that figure should also be considered when evaluating the reasonableness of a punitive damages award. A punitive damages award that is only a fraction of the profit pocketed by defendant as a result of his deceit may be appropriate, even where it is a larger multiple of compensatory damages. The purposes of a punitive damages award—punishment and retribution—would hardly be served if the defendant were allowed to retain the profit of his misconduct.

A comparison of the punitive damages awarded in other civil cases or criminal penalties that could be imposed for similar misconduct: The third *Gore* guidepost considers criminal penalties that could be imposed for the same or similar conduct, but only to the extent that the existence of criminal sanctions bears on the seriousness with which the state views the wrongful action. *Campbell*, No. 01-1289, slip op. at 18. The fact that imprisonment is available and likely to be imposed is significant. *Haslip*, 499 U.S. 1 at 23. The actual dollar amount of any potential fine is less instructive, however. *Id.*

A review of this Court's jurisprudence on punitive damages and due process illustrates that, short of a formulaic rule, this Court can offer no more "guidance" to lower courts. This Court has listed factors and clearly illustrated their application. What more can this Court do? Thus, unless this Court intends to establish a bright-line rule, there is no need to

offer further guidance to lower courts, and this petition need not be granted on that basis.

B. The Court of Appeals properly stated and applied this Court's decision in *BMW v. Gore.*

An analysis of the lower court's opinion in this case establishes that lower courts are properly applying the guidelines set forth by this Court. The Texas Court of Appeals in this case applied the *Gore* factors and held that the punitive damages award was reasonable. *Cass v. Stephens*, 2001 WL 28092, *31-33. There is ample evidence of reprehensibility, the most significant of the *Gore* factors, to support the punitive damages award in this case. Also, the punitive damages award is less than half of the funds obtained by the sale of the Cass Companions Wells, which further supports its reasonableness. The Court of Appeals analyzed this case as follows:

The degree of reprehensibility of the Defendant's misconduct: The Court of Appeals discussed the reprehensibility of Cass's conduct, which is the "most important" *Gore* factor, at length in its opinion. Cass orchestrated and carried out a deliberate pattern of deception on a vulnerable elderly woman, and the Court repeatedly emphasized the deliberate manner with which Cass defrauded and deceived her. Consider:

- Cass defrauded the joint interest owners and converted their equipment for his own personal gain, *Cass*, 2001 WL 28092 at *30;

- Cass converted jointly-owned equipment with actual malice—Cass actively tried to conceal his bad acts, Cass altered established accounting procedures to provide less

information to the working interest owners, Cass failed to provide the auditors with the documents disclosing unauthorized transfers and gross overbilling, and Cass attempted to destroy the documents tracing the fraudulent transfers and bogus charges by throwing them in the trash, *Id.* at 28;

- Cass kept a very detailed accounting of expenditures for himself, but sent out very condensed and abbreviated accountings to the joint interest owners, which contained very little information concerning the details of the expenditures, which was highly irregular in the oil and gas business; a witness testified that the procedure was implemented solely to keep Mrs. Stephens from discovering the types of costs for which she was being billed, *Id.* at *19;

- The Stephens' wells were billed and Mrs. Stephens paid for numerous goods and services, including ad valorem taxes, hauling, electricity, and road work, provided solely to the Cass companion wells, *Id.* at *13;

- Cass billed Mrs. Stephens for "operating expenses" for inactive wells, which she paid, *Id.*;

- Cass personally benefitted from these "misallocations," *Id.*;

- Cass personally altered and signed numerous delivery tickets and vendor's invoices to divert expenses from the Cass companion wells to the Stephens wells, which Mrs. Stephens paid, *Id.*;

- Jointly-owned equipment was systematically transferred from the Stephens wells to the Cass companion wells, with no credit given to Mrs. Stephens for the transfers, *Id.* at *14;

- Cass specifically tried to conceal his relationship with numerous affiliate companies not only from the joint interest owners who paid these companies for "services," but from the auditors hired to audit the joint interest billings, *Id.* at *19;

- Cass destroyed documents requested both by the auditors and by Mrs. Stephens in discovery requests[21], *Id.*;

- Cass ran a multi-million dollar corporation, while Mrs. Stephens was a housewife generally unfamiliar with the oil and gas business, who was working to settle the affairs of her husband's estate, *Id.* at *30;

- Cass took advantage of General Stephens during his illness and Mrs. Stephens by systematically inflating the

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[21]Cass argues that this conduct is "not related to the subject matter of the litigation" and should not have been considered by the jury in awarding punitive damages. See Cass Pet. at 14-15. First, this conduct occurred both before and after suit was filed. After the suit was filed, such conduct might have been a discovery violation, but it was also the continuation of a pattern of fraud and deceit perpetrated by Cass and is thus relevant to the punitive damages inquiry. Second, there is no evidence that this conduct was considered by the jury in making the punitive damages award. Contrary to Cass's statement that the record is "bereft of clear evidence of any intent to defraud or of malicious conversion" Cass Pet. at p. 14, there is overwhelming evidence of intentional, fraudulent conduct to support the jury's award in this case. Finally, even if there was such evidence, Cass did not argue on appeal that such information should have been kept from the jury, nor did he challenge the punitive damages question and instructions on appeal, so this issue is not properly before this Court.

joint interest billings, making fraudulent expense charges, and converting the jointly-owned equipment, *Id.*;

- Cass deliberately and intentionally acted for his own benefit at the expense and detriment of the working interest owners, *Id.* at *28;

- Cass generally resisted and attempted to delay the trial of this matter for approximately ten years, *Id.*;

- Cass and his son committed a "pattern of abuses," including making the joint interest owners pay multiple times for the same property, discontinuing their procedures for documenting material transfers thereby making it harder to trace property transfers, destroying documents that evidenced the transfers, failing to give auditors the documents necessary to trace the transfers, and finally, selling the Cass companion wells, including the converted equipment, for $12,000,000.00, *Id.* at *16.

The Court noted that the jury could easily find the facts to be "substantially offensive" to a public sense of justice and propriety. *Id.* at *30.

Although the harm in this case was predominantly economic, Mrs. Stephens and her daughter also testified as to the toll the long years of litigation and the betrayal of trust by a close personal friend had taken. *Cass*, 2001 WL 28092 at *5. Cass's conduct clearly evidenced a disregard for the rights of others—he systematically lied, cheated, and stole from a vulnerable elderly woman who had placed her trust in him as her husband's former business partner and friend. Cass's conduct illustrated a pattern of deception—one that would likely have

continued had Mrs. Stephens not waged a sixteen-year battle to bring it to an end. And this case epitomizes intentional malice, trickery and deceit. Cass's was truly reprehensible conduct. As the Texas Court of Appeals stated:

> Frank (Cass) and Michael intentionally and deliberately defrauded and converted the property of the joint interest owners for their own personal benefit. Fraud and conversion are ancient wrongs which are roundly denounced and receive little public sympathy. Here, the facts are egregious and show a deliberate attempt by both men to escape responsibility for their wrongful conduct.

Cass, 2001 WL 28092 at *32.

The disparity between actual and punitive damages: The judgment awarded $786,243.91 actual damages against Cass: $586,162.17 for breach of contract, $101,300.92 for fraud, and $98,780.82 for conversion. As remitted, Mrs. Stephens was awarded punitive damages of $2.5 million for fraud and $2.5 million for conversion. The ratio of punitive damages to all actual damages is 6:1; the ratio of punitive damages to fraud damages is about 25:1, as is the ratio of punitive damages to conversion damages. Significantly, however, the total punitive damages awarded against Cass in this case—$5 million—is less than half of what was obtained from the sale of the Cass Companion Wells.[22]

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[22]Cass and his sons jointly owned the Cass Companion Wells that were sold for $12 million. Michael testified that he got about $3.8 million. XXVII: 82-83. Presumably, Frank's other son also got a share. Cass and both of his sons were defendants at trial, and the jury awarded a total of $7.5 million in punitive damages

The Court of Appeals first noted that this Court has consistently rejected a categorical approach to determining what is a "grossly excessive" ratio. *Id.* at *32. It emphasized that this Court's mandate was that the award be "reasonable and not shocking to our judicial sensibilities." *Id.* The Court thoroughly reviewed the record and considered all of the evidence, both in support of and against the jury's verdict. Applying the "eyebrow" test, the court was not shocked by the ratios in this case. *Id.* The court emphasized Cass's intentional, fraudulent conduct and the fact that such conduct was for Cass's personal benefit. *Id.* The court noted that Cass's behavior was truly "egregious" and illustrated a deliberate attempt to escape responsibility for his wrongful actions. *Id.* at 32. The Court repeatedly noted that the Cass companion wells were sold for $12 million. *Id.* at *15, *28, *31.

A comparison of the punitive damages awarded in other civil cases or criminal penalties that could be imposed for similar misconduct: The Court of Appeals noted that Texas criminal law punishes theft of property in the amounts converted here as a third-degree felony. *Cass*, 2001 WL 28092 at *33. In Texas, such conduct is punishable by up to 10 years in jail and carries a minimum sentence of two years. *Id.* Given that Texas considers such conduct serious enough to be classified as a felony, a substantial punitive damages award is justified.

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against all of the defendants. Thus, even if the total punitives are compared to the total received by all three men from the sale of the Cass Companion Wells, the punitive damages are only 63% of the sale price. This suggests that the award could have been significantly higher and still not eviscerated the defendants' gain from Cass's scheme.

Significantly, the Court of Appeals did not violate any of the other "rules" propounded by the Court. The Court of Appeals did not consider out-of-state conduct or conduct bearing no relation to Mrs. Stephens' harm. No dissimilar acts were considered (as in *Campbell*). The jury was dealing with a pattern of deceitful, fraudulent conduct perpetrated on an elderly woman who considered Cass a friend. The award was most likely driven by the jury's abhorrence of Cass's conduct and their desire to punish him and to deter similar conduct.

In sum, Mrs. Stephens was confronted with her husband's long illness, during which time he was unable to handle his financial affairs, and eventual death. Mrs. Stephens' husband had been partners with Cass, and she trusted him; the jury apparently believed that he took unfair advantage of her trust. Considering the evidence as a whole, and taking into account the jury's unwillingness to believe most of Cass's testimony, the Court of Appeals determined that the evidence regarding the degree of reprehensibility of Cass's conduct was overwhelming.

C. The Texas Court of Appeals properly stated and applied this Court's punitive damages jurisprudence.

The Texas Court of Appeals correctly stated and applied this Court's pronouncements regarding the constitutionality of punitive damages award. Cass argues that the Court of Appeals merely "claimed" to follow *Gore*, implying that even though the law was correctly stated, it was misapplied. But this Court rarely grants a writ of certiorari when the asserted error is the misapplication of a properly stated rule of law. SUP. CT. R. 10. Thus, this case does not merit review by this Court and Cass's Petition for Writ of Certiorari should be denied.

II. Cass's second issue, that Texas Rule of Appellate Procedure 47.7 violates due process, is not justiciable.

Cass argues that Texas Rule of Appellate Procedure 47.7, which affects the citability and precedential value of unpublished opinions, violates due process. He complains both that unpublished opinions cannot be cited, and that such opinions have no precedential value. Neither issue is properly before this Court. First, Cass failed to raise this issue in the Court of Appeals by moving for publication as permitted by the Texas Rules of Appellate Procedure. Second, to the extent Cass complains that unpublished opinions cannot be cited, his complaint is moot. Finally, to the extent he complains that unpublished opinions have no precedential value, Cass does not have standing to bring this issue before this Court.

A. Cass did not timely raise this issue.

The Court of Appeals released an unpublished opinion in this case, which Cass claims is a violation of his due process rights. But Cass never made a motion to publish the opinion, as permitted by the Texas Rules of Appellate Procedure. TEX.R.APP.P 47.3(c). Had the Court of Appeals denied a motion to publish, he could have then asked the Supreme Court to order the opinion to be published. TEX.R.APP.P. 47.3(d). Cass did neither. By failing to move for publication of the opinion in the Court of Appeals, Cass denied Texas courts the opportunity to review the constitutionality of a state statute. Because the issue was not raised in the courts below, this Court has no jurisdiction to review this issue. *TXO*, 509 U.S. at 463.

B. To the extent Petitioner complains that unpublished opinions cannot be cited, his argument is moot.

Cass complains that Texas Rule of Appellate Procedure 47.7 "prohibits the citation of unpublished opinions" and thus, violates due process. Effective January 1, 2003, however, Rule 47.7 was amended. It now allows the citation of unpublished opinions:

> Opinions not designated for publication by the court of appeals under these or prior rules have no precedential value but *may be cited* with the notation, "(not designated for publication)."

TEX. R. APP. P. 47.7 (emphasis supplied). The comment to the new rule now notes that it was "substantively changed to discontinue the use of the "do not publish," designation in civil cases, to require that all opinions of the courts of appeals be made available to public reporting services, and to remove prospectively any prohibition against the citation of opinions as authority in civil cases. . . ." Comment, TEX. R. APP. P. 47. Even an opinion previously designated "do not publish" such as the one at issue in this case, may be cited. *Id.*

Thus, to the extent that Cass complains that unpublished opinions cannot be cited, his complaint is moot. *United States Dept. of Treasury, Bureau of Alcohol, Tobacco & Firearms v. Galioto*, 477 U.S. 556, 559-60 (1986) (holding that an amendment to a challenged statute rendered the case moot).

C. To the extent that Cass's complaint is the precedential value of unpublished opinions, Cass does not have standing.

Cass also complains that Rule 47.7's limitation on the precedential value of unpublished opinions is unconstitutional. But because he cannot show that failure to give precedential value to an unpublished opinion harmed him in any way, he does not have standing.

The "fundamental aspect" of standing is that it focuses not on the issue before the Court, but on the party asserting that issue. *Flast v. Cohen*, 392 U.S. 83, 99 (1968). In other words, the standing inquiry asks whether the party seeking relief has alleged a personal stake in the resolution of the question, such that he is the proper party to ask this Court to adjudicate a particular issue. *Id.* Thus, the question is not whether this Court has jurisdiction to determine whether a state's rule regarding unpublished opinions is constitutional, but whether Cass has a real interest in that determination, so that he is the proper party to raise the issue.

This Court has identified three Constitutional standing requirements. First, the petitioner must establish that he has suffered an injury-in-fact—an invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Second, there must be a causal connection between the injury and the challenged conduct; the injury must be "fairly traceable" to the conduct of which petitioner complains. *Id.* Finally, it must be likely, and not merely speculative, that a favorable decision will redress the petitioner's injury. *Id.* at 561.

To have standing with respect to the constitutionality of limiting the precedential value of unpublished opinions, Cass must allege that he was injured by his inability to rely on an unpublished opinion. Yet Cass cites to no unpublished opinion that, had he been permitted to cite, would have compelled a different result in the courts below. He has never argued that a prior unpublished opinion would have compelled a different result in his case, had it had precedential value. He simply claims that *his* case was unpublished and that future litigants will not be able to rely on it in their cases. A future litigant whose case turns on whether or not Cass's case has precedential value might have standing to make the argument Cass makes here, but Cass does not. He can show no injury caused by Rule 47.7; thus, he has no standing to raise this issue before this Court.

D. Petitioner's real complaint is that the Texas Supreme Court did not review this case.

Cass states in his Petition for Writ of Certiorari that "No citation rules also make it difficult, if not impossible, for a litigant like Cass to convince a higher court to review a Court of Appeals' unpublished decision." Cass Pet. at p. 25. Cass is convinced that, had the Court of Appeals' opinion been published, the Texas Supreme Court would have granted his petition for review, reversed the Court of Appeals on all grounds, and left him with a take-nothing judgment in his favor. See Cass's Motion for Rehearing in the Texas Supreme Court at pp. 2-3 ("if the opinion was published, Mr. Cass is convinced that this Court would readily grant the Petition....The fact that the opinion is unpublished allows [the El Paso Court] to insulate themselves from this Court's review...given this Court's propensity not to grant petitions for review in cases where the appellate opinion is unpublished.").

Cass's argument that the Texas Supreme Court did not review his case because the opinion was unpublished is pure speculation and presupposes that the Court did not discharge its duties. Cass argues that he could not establish jurisdiction because the opinion was unpublished. First, jurisdiction is not dependent on publication. The Texas Supreme Court denied the petition outright—it did not dismiss it for want of jurisdiction. Jurisdiction is merely a prerequisite to granting a petition for review. It does not follow that the Court *will* grant the petition if it has jurisdiction, only that it may. Stated differently, the Texas Supreme Court is not obligated to take a case just because it has jurisdiction. So whether the fact that the opinion was unpublished affected the Court's jurisdictional analysis (and there is no indication that it could have), the fact that the opinion was unpublished did not necessarily impact the Court's decision not to review the case.

Cass argues that an unpublished opinion, because it has no precedential value, is *per se* not important to the jurisprudence of the state, so that the Texas Supreme Court is not likely to review it. But Cass has it exactly backwards. It is not that the opinion in his case was not important because it was unpublished; rather, the opinion was unpublished because it was not important to the jurisprudence of the state. This case raised no new issues that would have compelled its publication under the Texas Rules and that might have made the Texas Supreme Court more likely to exercise its discretion and grant review. If the lowers courts properly apply Rule 47, few, if any, unpublished opinions will merit review simply because the issues in those cases are so well-settled.

Cass may be arguing that the Texas courts somehow "conspired" to deny him adequate review. He states that the El Paso court violated Rule 47 by making this an unpublished

opinion, apparently in an effort to shield itself from higher court review. See Cass's Motion for Rehearing at p. 1. He also infers that the Texas Supreme Court denied his petition because it was unpublished, without regard for the Court's duty to consider the significance of each case. *Id* at 1-2. ("By allowing the El Paso Court to rewrite Texas state law on multiple occasions in a 65-page opinion, and then not publish that opinion, thereby giving it no precedential value for future litigants, this Court has put its stamp of approval on an abuse of power by the El Paso Court and has allowed Texas Rule of Appellate Procedure 47.7 to serve as a basis for courts of appeals to circumvent this Court's review of their blatantly erroneous decisions...this Court should recognize its duty to correct the injustice and grant the Petition."). If that is what Cass is asserting, this Court should be careful not to assume the role of ensuring that state court justices properly carry out their judicial duties. This Court should presume that the Texas courts followed the statutes which govern their decisions with respect to publication and review, particularly when there is no indication that either the El Paso Court of Appeals or the Texas Supreme Court did anything other than effectively carry out their duties under the law.

In conclusion, this Court does not have jurisdiction to consider whether the inability to cite and/or rely on unpublished opinions violates due process. And this Court should be wary of considering the issue Cass really asserts—that Texas courts blatantly violate the rules and manipulate litigants to defeat the ends of justice. That is simply not the case. The Texas Supreme Court, just like this Court, has discretionary review. Like this Court, the Texas Supreme Court must prioritize cases and deal with those it believes are the most significant to Texas jurisprudence. That is precisely what it did in this case.

CONCLUSION AND PRAYER FOR RELIEF

The Texas Court of Appeals properly analyzed the punitive damages award under this Court's punitive damages jurisprudence including *Gore, Campbell,* and related cases. Under that analysis, the punitive damages award is reasonably proportional and does not violate Cass's substantive due process rights. This case is not one where state courts approved a punitive damages award that was "out of bounds."

Cass's second issue, which concerns "no publication" rules, is not properly before this Court. Cass did not raise the issue in the courts below. To the extent Cass complains that Rule 47 prohibits citation of unpublished opinions, his argument is moot. To the extent he complains that Rule 47 precludes the precedential value of unpublished opinions, he does not have standing to bring the issue before the Court. This Court should take care to ensure it does not "police" state courts to ensure that they are properly fulfilling their duties under state law.

For these reasons, Mrs. Stephens prays that this Court deny Cass's petition for writ of certiorari.

Respectfully submitted,

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